

6-1-1983

Maritime Insurgency and the Law of the Sea: An Analysis Using the Doctrine of Distress

Grand Richard Telfer

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law of the Sea Commons](#)

Recommended Citation

Grand R. Telfer, *Maritime Insurgency and the Law of the Sea: An Analysis Using the Doctrine of Distress*, 20 SAN DIEGO L. REV. 625 (1983).

Available at: <https://digital.sandiego.edu/sdlr/vol20/iss3/8>

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

Comments

MARITIME INSURGENCY AND THE LAW OF THE SEA: AN ANALYSIS USING THE DOCTRINE OF DISTRESS

This Comment examines the international legal implications of an insurgent warship operating on the high seas. The specific issues addressed are the right of insurgents to conduct maritime operations and the right of third States to deny use of the high seas to insurgents. The issues are brought into a forum by means of the doctrine of distress, or force majeure. The Comment considers the insurgent warship in turn as a pirate vessel, and as stateless, and concludes that an insurgent is neither. Thus an insurgent warship is not generally subject to lawful interference on the high seas by third States.

INTRODUCTION

Perhaps the most effective way to introduce the topic of this Comment is to propose the following scenario: Ria Ensete is a dictatorship on a Latin American island. The government has normal diplomatic relations with most nations, including the United States, and is a member of both the United Nations and the Organization of American States. An insurgent movement, the Provisional Republic, forcibly contests the dictatorship. The Provisional Republic is formally recognized by over a dozen nations as "the legitimate government of Ria Ensete," and has a "government-in-exile" in one of them. While the insurgents enjoy significant popular support in Ria Ensete, the government forces have maintained effective control over virtually all of the island,

thus limiting the Republican forces to raids conducted from outside the country.

Two years ago, pursuant to a policy of strengthening anti-communist navies, the United States transferred a surplus warship to Ria Ensete. After the transfer was complete, a part of the crew spirited the ship out of Ria Ensete and declared it the flagship of the navy of the Provisional Republic. Subsequently, operating out of a third country port, the ship has been highly effective in controlling the territorial waters of Ria Ensete. It has destroyed government patrol craft, transported and supplied raiding parties, bombarded coastal installations, and enforced a partial blockade of arms shipments to Ria Ensete. The insurgents have also used the ship for diplomatic visits to recognizing countries.

Recently, caught in a tropical storm, the ship collided with a United States merchant vessel in international waters. Seriously damaged, the ship escaped sinking only by taking refuge in a Puerto Rican port.

The following day, the owners of the merchant vessel filed a maritime libel in a United States District Court¹ against the ship and requested a warrant for arrest of the ship. This warrant was issued and served on the commanding officer, who accepted it but refused to permit any possessory actions.

Within three days, the following had been filed:

- (1) An answer, by the insurgents, claiming immunity from local jurisdiction based on entry into port due to circumstances of distress, or *force majeure*.
- (2) An intervention, by the Ria Ensete government, alleging the ship to be a pirate under article 15 of the 1958 Convention on the High Seas,² and requesting reconveyance.

Subsequently, the original complaint was settled out of court. The district court is thus left with the Ria Ensete claim for reconveyance and the claim by the warship to immunity from local jurisdiction.

Using the preceding scenario, this Comment will explore the potential legal issues raised by operation of a warship on the high seas by a political entity other than a sovereign "State."³ The par-

1. The district courts have exclusive original jurisdiction over civil cases of admiralty or maritime jurisdiction. 28 U.S.C. § 1333 (1976).

2. Convention on the High Seas, Apr. 29, 1958, art. 15, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as High Seas Convention].

3. The generally accepted meaning of the term "State" combines territorial and political sovereignty. The Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19, established that criteria for statehood include: (a) a permanent population; (b) a defined territory; (c) government;

ticular focus is on a relatively new type of "international" insurgency which is being encountered with increasing frequency: It operates from sanctuaries in a third State rather than from controlled national territory.⁴ While such an insurgency does not meet generally accepted standards of legitimacy,⁵ some examples exist where supportive third States have sought to legitimize these movements through recognition.⁶ The availability of effective maritime power to an insurgency in the form of missile-capable gunboats⁷ and the sweeping changes in maritime jurisdiction evolving from the Law of the Sea Conference⁸ increase the probability of a "maritime insurgency." This was demonstrated by an August 1981 incident involving an Iranian gunboat.⁹ The 160-foot missile-capable *Tabarzin* had been built in France under a contract with the former government of the Shah. The Shah was deposed prior to completion, and representatives of the new regime took delivery of the warship. Enroute from France to Iran, anti-Khomeini commandos, members of the insurgent group Azedegan, boarded and seized the ship. Their intentions were to seek refuge in Morocco, but mechanical and supply problems forced them to the French Riviera, where the incident ended.¹⁰ A more successful seizure could have led to a protracted maritime

and (d) capacity to enter into relations with the other states. *Id.* art. 1. *See infra* notes 139-46 and accompanying text.

4. Examples of "international insurgency" include Palestine, Namibia, Sarawak, Spanish Sahara, Vietnam and Rhodesia. *See generally* O'Neill, *Insurgency: A Framework for Analysis*, in *INSURGENCY IN THE MODERN WORLD* 1, 15-16 (B. O'Neill, W. Heaton, & D. Alberts eds. 1980).

5. Control of a definite area of national territory is a general prerequisite. *See* Higgins, *Internal War and International Law*, in 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 81, 86-87 (C. Black & R. Falk eds. 1971).

6. A ready example of a recognized insurgency is Palestine; the Palestine Liberation Organization has been recognized by numerous governments, the Organization of Arab States, and to an extent, the United Nations, including status as a signatory observer at the Law of the Sea Conference, even though the only territory it "controlled" was in a third State. *See* Comment, *Standing Before the International Court of Justice; The Question of Palestinian Statehood Exemplifies the Inconsistencies of the Requirement of Statehood*, 7 *CAL. W. INT'L L.J.* 454, 454-56 (1977).

7. *See generally* Hazlett, *Strait Shooting*, *U.S. NAVAL INST. PROC.*, June 1982, at 70 (discussing acquisition of missile-carrying warships by nations bordering international straits).

8. *See generally* J. NYE, *SHOULD WE CUT OUR LOSSES? U.S. FOREIGN POLICY & INTERNATIONAL REGIMES* 1-5 (1981) (discussing the historical background and jurisdictional evolution in the ocean regime).

9. *N.Y. Times*, Aug. 15, 1981, at A1, col. 1.

10. *N.Y. Times*, Aug. 20, 1981, at A3, col. 4.

resistance to the Khomeini government. Legal issues might well have arisen involving third States, particularly if the rebels attempted to establish a blockade¹¹ of oil exports from Iran.

Other instances of potential maritime insurgency exist,¹² and changes in the ocean regime brought about by the Law of the Sea Conferences will heighten the potential. In particular is the increase in non-high seas area for potential conduct of maritime civil strife. With coastal State jurisdiction increasing from a narrow three-mile belt to possibly thirty percent of the world ocean,¹³ there is an expansive arena created for domestic hostilities.¹⁴ One commentator notes: "With the emergence of new types of maritime zones the area of the high seas will shrink considerably, providing a quite expanded, relatively safe area for the acts of insurgents. It would appear that if such zones come into existence, rebels will be fairly accommodated."¹⁵

In order to properly examine the legal issues involved, a forum is necessary. Courts of law do not convene on the high seas¹⁶ since such a manifestation is an exercise of sovereignty, which is forbidden by international law.¹⁷ Courts of law do, however, convene on the high seas in a figurative sense when a municipal or international court, in the course of deciding a case arising from an incident on the high seas, resolves the various issues from the perspective of the legal framework of the high seas "regime" within which the incident occurred. The premise of this Comment is that a high seas issue of law can be beneficially analyzed

11. See generally C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 454 (1962) (discussing blockades by insurgents).

12. A minor example of potential insurgency involves the anti-Castro Cuban exiles, known by various names, including Alpha 66 and Cubans United. San Diego Union, Aug. 16, 1981, at A9, col. 1. A major example is the now-unrecognized Republic of China on Taiwan, with a sizable navy.

13. Booth, *Military Implications of the Changing Law of the Sea*, in *LAW OF THE SEA: NEGLECTED ISSUES* 341 (J. Gamble, Jr., ed. 1979).

14. The thrust of this Comment addresses a unique concern of maritime stability. While the provisions of article 58 of the United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982) [hereinafter referred to as Convention], permit "high seas" operations within the Exclusive Economic Zone, such operations must not interfere with coastal State regulation of resource exploitation. The existence of civil strife in the maritime zone may lead to creation of Maritime Control Zones by the belligerents involved, in order to effectuate actual control over the resource exploitation. See generally S. SWARZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* 152-56 (1972) (discussing Maritime Control Zones during World War II).

15. Crockett, *Toward a Revision of the International Law of Piracy*, 26 *DE PAUL L. REV.* 78, 96 (1976).

16. A proceeding such as a court-martial on a naval vessel is not "on the high seas," but is within a moving part of the territorial jurisdiction of the sovereign. See C. COLOMBOS, *supra* note 11, at 259-60.

17. High Seas Convention, *supra* note 2, art. 2.

by transporting a piece of the high seas into a courtroom. Accordingly, the factual scenario at the beginning of this Comment serves both to introduce the question into a United States court, and to provide a framework within which the parameters of such a problem may be considered. The method of introduction selected was through the doctrine of distress, or *force majeure*.¹⁸ This doctrine, which in essence gives a ship forced into port by storm or other exigency immunity from local jurisdiction, is considered to have universal and traditional acceptance among seafaring nations.¹⁹

The doctrine of distress will be initially analyzed to show a perceived shifting in approach: from a concept of distress immunity as an all-encompassing exception to local jurisdiction, to a more limited concept of distress immunity as an exception to local jurisdiction based on "refuge" from the high seas. Under the latter approach, local jurisdiction over vessels entering port due to distress is extended to those vessels which had no basic right to use the high seas. The result of this approach is that a district court, in ascertaining whether local jurisdiction exists over the vessel, must determine whether the vessel could have been lawfully interfered with on the high seas. Such determination is the object of this Comment, and the discussion will be ultimately reduced to analysis of two issues which the scenario would present to a dis-

18. The two terms distress and *force majeure* are normally used interchangeably, and will be within this Comment. In a strict sense, however, distress refers to a condition of plight caused by weather, damage to the ship, or lack of provisions. *Force majeure* refers to the involuntary entry caused by an overwhelming force, such as a mutiny. See Harvard Law School, *Research in International Law: Territorial Waters*, 23 AM. J. INT'L L. 299 (Spec. Supp. 1929) [hereinafter cited as Harvard: *Territorial Waters*].

19. See *infra* note 22 and accompanying text. The scenario is intended to be, to whatever extent possible, "neutral," to promote an objective judicial consideration as opposed to legal reasoning which merely supports a deference to a State Department "suggestion." See Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461 (1963). Procedural questions, including standing, are relevant only as domestic concerns, without significance to the Law of the Sea, and, accordingly, are not addressed in this Comment. A related issue, the doctrine of immunity of a foreign sovereign as applied to an insurgent warship, is beyond the scope of this Comment. As a general proposition, however, that doctrine is based on comity, rather than customary international law, and the insurgent warship would be unlikely to receive the privilege. See generally Foreign Sovereign Immunities Act of 1976, 18 U.S.C. §§ 1602-1611; Annot., 25 A.L.R.3d 322 (1969); Annot., 99 L. Ed. 403 (1954).

strict court: (1) consideration of an insurgent warship as a pirate vessel; and (2) consideration of an insurgent warship as stateless.

INSURGENT VESSELS IN DISTRESS

Historical Development of International Customary Law Pertaining to Distress

The right of vessels to enter the territorial waters of another State is by no means traditional, and the status of foreign ships in coastal waters was, for centuries, precarious.²⁰ The development and current status of overall entry rights is beyond the scope of this Comment,²¹ but the right of entry by ships in distress has been among the most accepted.

There is one condition under which a foreign vessel in territorial waters may claim as of right an entire immunity from the local jurisdiction. The condition is that such presence in territorial waters be due to *force majeure*. If a ship is driven in by storm, carried in by mutineers, or seeks refuge for vital repairs or provisioning, international customary law declares that the local state shall not take advantage of its necessity.²²

The principle has been recognized for over two centuries.²³ In 1799, for example, the American sloop *Nancy* was forced by stress of weather to make port in France, in violation of the Non-Inter-course Act of 1798.²⁴ Upon departure it was only permitted to carry away local produce. In a subsequent action in which the *Nancy* was charged with violating the Act, the vessel was found not guilty. The Supreme Court, in an opinion authored by Chief Justice Marshall, said:

Even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and purchase a new cargo, I am of the opinion that it would not have been deemed such a traffic with the enemy as would vitiate the policy upon such new cargo.²⁵

Recognizing the critical need for maritime nations to establish a concept of refuge from the perils of the sea, and with an eye to the potential danger to such custom if abused by fraud, Sir William Scott formulated the generally accepted legal requisites of the doctrine of *force majeure*:

Real and irresistible distress must be at all times a sufficient passport for

20. See 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 197 (3d ed. 1957).

21. See Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 *SAN DIEGO L. REV.* 597 (1977).

22. P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 194 (1927).

23. See 2 OPPENHEIM'S *INTERNATIONAL LAW* 479 (Lauterpacht 7th ed. 1952) (noting a 1746 incident).

24. Ch. 53, 1 Stat. 565.

25. *Hallet & Bowne v. Jenks* (the sloop *Nancy*), 7 U.S. (3 Cranch) 210, 219 (1805).

human beings under any such application of human laws. Now, it must be an urgent distress; it must be something of grave necessity; such as . . . where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds; the danger must be such as to cause apprehension in the mind of an honest and firm man.²⁶

Courts have extended the doctrine to cargo carried on a ship. During the War of 1812, an American privateer captured the British brig *Concord*, and after bringing in the prize, the cargo was sold. The Supreme Court upheld a claim by the neutral owners of the cargo for restoration of the proceeds, and without payment of import duties. The opinion by Justice Story held that such introduction by *force majeure* could not be considered importation, in the legal sense.²⁷ In subsequent cases, the closest scrutiny was paid to the factual circumstances attending the claim of necessity, and the perceived intent of the overall voyage was judicially considered.²⁸

As the doctrine of distress became approved as a principle of custom²⁹ in international law, a number of nations included provisions in treaties regarding vessels in distress.³⁰ These treaties often became the basis for arbitrations involving assessments levied against vessels, where entry was claimed a necessity.³¹ An example involved the American schooner *Rebecca*.³² While bound for Brazos, Texas, in 1884 with general merchandise and a

26. The *Eleanor*, Edw. 135, 159, 165 Eng. Rep. 842, 1058 (1809) (the opinion also included "moral necessity" where, for instance, previous damage made continuation of the voyage dangerous to the lives of persons on board).

27. The Brig *Concord*, 13 U.S. (9 Cranch) 387, 388 (1815).

28. See, e.g., The *New York*, 16 U.S. (3 Wheat.) 59 (1818) (distress denied as based on "trivial accidents" and accompanied by overall suspicious circumstances).

29. "Custom is the most important source of the international law of the sea and the usages of the great maritime States must therefore always exercise a weighty influence on its development." C. COLOMBOS, *supra* note 11, at 7. International law is created by two principal sources: legislation and custom. H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 440-41 (R. Tucker 2d ed. 1966). Legislation is conscious and deliberate centralized lawmaking by special organs. Custom is unconscious and unintentional decentralized behavioral practice which, after repeated performance by individual States acting under a perceived obligation, evolves into a norm. *Id.*

30. See 1 C. HYDE, *INTERNATIONAL LAW* 745 (1945); 1 G. SCHWARZENBERGER, *supra* note 20, at 197.

31. 2 J. MOORE, *DIGEST OF INTERNATIONAL LAW* § 208, at 339-62 (1908); 2 J. MOORE, *INTERNATIONAL ARBITRATIONS* 1055-69 (1898); 4 J. MOORE, *INTERNATIONAL ARBITRATIONS* 4346-79 (1898).

32. A detailed account is found in 2 J. MOORE, *DIGEST*, *supra* note 31, at 345-48; see also W. BISHOP, *INTERNATIONAL LAW* 612-15 (3d ed. 1971).

cargo of lumber for Tampico, Mexico, the ship was seriously damaged by a storm which drove it south to the vicinity of Tampico. Unable to make Brazos, the *Rebecca* entered Tampico and notified authorities of the distress. However, Mexican customs officials charged the ship's Master with smuggling and, under court order, seized and sold the ship and cargo. The subsequent claims commission found for the vessel owner.³³

Codification of the Doctrine of Distress: The Law of the Sea Conferences

In 1928-29, in anticipation of the 1930 Hague Convention, Harvard Law School conducted a project on *Research in International Law*, which included proposals for draft conventions on relevant subjects. The proposed convention on territorial waters included an article covering vessel entry under conditions of distress:

Article 17

A state may exercise jurisdiction over a vessel of another state which is in its territorial waters for purposes other than innocent passage through its marginal sea to the same extent as over a vessel in port. However, a vessel engaged on a bona fide voyage which is not approaching, entering or leaving a port of the littoral state, and which enters territorial waters or breaks innocent passage because of distress or *force majeure*, shall, together with the persons and property on board, be immune from all penalties, dues or exactions which might otherwise have been incurred by reason of its presence in territorial waters.³⁴

The Harvard project is important insofar as it was the base of reference for the first Law of the Sea Conference.³⁵ From that conference came the 1958 conventions, including the Convention on the Territorial Sea and the Contiguous Zone.³⁶ Article 14 of that Convention reads, in pertinent part:

1. Subject to the provisions of these articles, ships of all States . . . shall enjoy the right of innocent passage through the territorial sea. 2. Passage means navigation through the territorial sea. . . . 3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.³⁷

This provision was included in the Law of the Sea Convention.³⁸ In addition to the above international codifications, some

33. Case of *Kate A. Hoff* (United States v. Mexico), *Opinions of Commissioners* 174 (1929).

34. Harvard: *Territorial Waters*, *supra* note 18, art. 17.

35. Sundberg, *Piracy: Air and Sea*, 20 DE PAUL L. REV. 337, 373 (1971).

36. Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

37. *Id.*, art. 14.

38. Article 18, paragraph 2, of the Convention, *supra* note 14, discussing innocent passage reads:

Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are inciden-

municipal statutes and cases exist.³⁹

Scope of the Doctrine of Distress

Thus far in history, there does not appear to be any recorded incident involving an insurgent vessel claiming distress. To ascertain the reception of such a claim, specifically in a United States court, an investigation of the limits of the doctrine is appropriate. This involves a determination as to whether there are classes of vessels which, despite factual circumstances of distress, are not entitled to immunity from local jurisdiction. The scope of the doctrine is considered under two approaches: (1) distress as an all-encompassing exception; and (2) distress as a refuge from the high seas.

The All-Encompassing Exception

This approach looks at a claim of distress with only the mariner's eye. If distress is genuine, the ship is immune from local jurisdiction, and no consideration is given to the ownership, nationality, or use of the ship. French statutory law says simply that "*force majeure* necessarily makes an exception to all rules."⁴⁰

The United States pressed Great Britain over the absolute principles of the distress doctrine in a series of five cases between 1831 and 1841 involving American ships carrying slaves.⁴¹ The five ships involved were all carrying slaves in cabotage.⁴² Three were wrecked in the Bahamas (*Comet* in 1831, *Encomium* in 1833, *Hermosa* in 1840); local British authorities liberated all the slaves. The fourth ship, the *Enterprise*, was forced by stress of weather and lack of provisions to put into Bermuda in 1835. A local court issued a writ against the master to produce the slaves, who were

tal to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Articles 39 and 54 incorporate the doctrine as regards transit passage through straits and archipelagic sea lanes passage, respectively.

39. See, e.g., Harvard: *Territorial Waters*, *supra* note 18, at 300-07.

40. *Id.* at 301.

41. Detailed accounts of distress incidents are located in P. JESSUP, *supra* note 22, at 197-202, and 2 J. MOORE, *DICTIONARY*, *supra* note 31, at 350-61.

42. Cabotage is defined as coastal trade between ports of the same State. This type of trade enjoys special protections, normally a national monopoly, recognized in international law. See generally C. COLOMBOS, *supra* note 11, at 383-86.

set free.⁴³ The fifth ship involved, the *Creole*, was forced into Nassau in 1841 by the slaves on board, who had revolted, killing one person and wounding four others. After three days of histrionics involving the American consul, other Americans in port, local magistrates, local militia officials, and a mob of natives, the slaves not implicated in the murder were set free.⁴⁴

The British paid an indemnity for the *Comet* and *Encomium* incidents, but refused to acknowledge any liability in the *Enterprize*, *Hermosa*, and *Creole* cases on the ground that, since these occurred after the 1834 effective date of the Act abolishing slavery in the British Colonies,⁴⁵ the slaves became free upon entering British jurisdiction.

The three cases were submitted for arbitration under an 1853 treaty establishing a mixed claims commission.⁴⁶ Mr. Bates, the umpire, awarded compensation to the United States claimants in all three cases.⁴⁷ Two principles were underscored in the decisions accompanying the slave ship cases. The first is that the "law of nations" are determinative in cases of distress, when in conflict with municipal law, even though the latter is statutory while the former is often an "understanding" of custom and international acceptance as expounded by infrequent writers.⁴⁸ The second is that a legal remedy is often an acceptable palliative under international law for an equitable remedy made unattainable by municipal law, or by political exigencies. In support of the latter proposition, the reality of the five cases is that the slaves stayed free.⁴⁹ With respect to the principles of the doctrine of distress, the extent of claim by the Americans, agreed to by the British, supports an extremely broad application of the doctrine.

43. See 2 J. MOORE, DIGEST, *supra* note 31, at 350.

44. A detailed narrative of the incident is in *id.* at 358-60.

45. Act of 28 Aug. 1833, 3 & 4 Will. 4, ch. 73.

46. Claims Convention, Feb. 8, 1853, United States-Great Britain, 10 Stat. 988, T.S. No. 123.

47. 4 J. MOORE, INTERNATIONAL ARBITRATIONS, *supra* note 31, at 4372-79. The comments of Bates, the arbitrator, reflected on both the laws of nations and the slavery circumstances. *Id.*

48. Of interest is the fact that the opinions by Bates liberally cited "the law of nations," but nowhere referenced where an exposition of the limits of those laws was to be found. See *id.* at 4349-78.

49. While the obvious retort to this observation is the length of time from incident to settlement, a rereading of the *Enterprize* and *Creole* narrations found in 2 J. MOORE, DIGEST, *supra* note 31, at 356, 360, supports the proposition that, had Webster and Ashburton been arguing before Bates on the wharf in Hamilton or the beach in Nassau, a legal remedy would have been quite acceptable. As this relates to the main subject of this Comment it is important to understand that modern insurgents invoke deep emotional responses within the populace, which international law must accommodate if it is to be accepted by the municipal authorities who ultimately must enforce it. See generally Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1 (1969).

A furor arose over these incidents in both Congress and Parliament. The exchanges between Secretary of State Webster and Lord Ashburton, involved the essence of jurisdiction over vessels. Webster argued:

A vessel on the high seas . . . is regarded as part of the territory of the nation to which she belongs, and subjected exclusively to the jurisdiction of that nation. If, against the will of her master or owner, she be driven or carried nearer to the land, or even into port . . . it would hardly be alleged by anyone, that, by the mere force of such arrival within the waters of the state, the law of that state would so attach to the vessel as to affect existing rights . . .⁵⁰

Lord Ashburton's response was an agreement with the doctrine of distress and jurisdiction over vessels: "Upon the great general principles affecting this case we do not differ."⁵¹ But he differed sharply with the circumstances attendant to the slaves:

You admit that if slaves, the property of American citizens, escape into British territories, it is not expected that they will be restored; . . . the present state of British law is in this respect . . . the same with the laws of every part of the United States where a state of slavery is not recognized; and that the slave put on shore at Nassau would be dealt with exactly as would a foreign slave landed, under any circumstances whatever, at Boston.⁵²

In the period following the *Creole* incident the controversy nearly put an end to the important negotiations which led to the Webster-Ashburton Treaty of 1842.⁵³

Perhaps the strongest support for the doctrine of distress as an all-encompassing exception comes from incidents involving belligerents.⁵⁴ While instances of vessels of neutral nations being

50. Letter from Webster to Ashburton (Aug. 1, 1842), reprinted in 2 J. MOORE, DIGEST, *supra* note 31, at 353-54.

51. 2 J. MOORE, DIGEST, *supra* note 31, at 355.

52. *Id.* An interesting speculation arises from considering the *Enterprise* or *Creole* as ending up in Boston instead of in British colonies. The United States Supreme Court might have faced the factual issue of acquired freedom for slaves transported into free States in the relative calm of the early 1840's, and could possibly have avoided the later disastrous decision of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). See generally R. McCLOSKEY, THE AMERICAN SUPREME COURT 91-97 (1960); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 416 (1978).

53. 2 J. MOORE, DIGEST, *supra* note 31, at 352.

54. Belligerency is a condition, express or implied, of war between two sovereign States, which carries with it legal entitlements with respect to third States. An insurgency, on the other hand, is a domestic matter, and insurgents enjoy no international entitlements. At some level of effectiveness, however, insurgents may gain the status of belligerents, and be accorded international entitlements exclusive of the parent government. See generally H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 175-201 (1947 & photo. reprint 1978).

forced into a belligerent's port by distress have occurred,⁵⁵ the unrestricted use of the high seas by neutral vessels is generally accepted.⁵⁶ The merchant ships of belligerents, however, may be seized and confiscated by their adversaries anywhere at sea beyond neutral waters, and similarly, warships may be attacked.⁵⁷ The privilege of belligerency obviously exists within the belligerent's own territorial waters. Thus, the doctrine of *force majeure* is significantly enhanced by a holding that an enemy ship "which seeks an asylum in distress should be released and not taken as prize."⁵⁸

Two incidents of belligerent entries in distress have been reported.⁵⁹ In 1799, during war with France, a Prussian merchantman forced to take refuge in Dunkirk was seized, but was restored by the French Prize Court. But the quintessence of the doctrine of distress was the case of the *Elisabeth*. In 1746, during war with Spain, this British man-of-war was forced to take refuge in Havana. She was not seized, but was instead offered repair facilities and given safe conduct to Bermuda.⁶⁰

Recognition of the above cases as precedent by a court would support an interpretation of the doctrine of distress as an all-encompassing exception and the only issue to be determined would be the validity of the circumstances of the insurgent's distress to establish the claim of necessity.⁶¹ If the distress claimed was factually established, the vessel would be immune from local jurisdiction regardless of any other factors.⁶²

The High Seas Refuge

This approach limits the scope of the doctrine by considering distress from its maritime perspective: the seeking of refuge in a port when stress of weather, damage, mutiny or other unexpected occurrence renders continued prosecution of the voyage on the

55. See, e.g., *The Nuestra Senora de Regla*, 84 U.S. (17 Wall.) 29 (1872); *The Diana*, 74 U.S. (7 Wall.) 354 (1868); *The Sunbeam*, 23 F. Cas. 407 (C.C.S.D.N.Y. 1863) (No. 13,615); *The Major Barbour*, 16 F. Cas. 530 (S.D.N.Y. 1862) (No. 8,963).

56. See B. BRITTIN, *INTERNATIONAL LAW FOR SEAGOING OFFICERS* 217 (3d ed. 1972).

57. C. COLOMBOS, *supra* note 11, at 548.

58. P. JESSUP, *supra* note 22, at 207 (citing French sources).

59. See, e.g., 2 OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 23, at 479 n.3.

60. *Id.*

61. *The Eleanor*, Edw. 135, 159, 165 Eng. Rep. 842, 1058 (1809).

62. Of necessity, there are some limitations on immunity, notably the health and safety of the populace. A ship loaded with explosives and on fire, or a ship carrying a highly contagious disease are examples. Additionally, a ship entering port under conditions of distress must comply with local navigation regulations. See M. McDougall & W. Burke, *THE PUBLIC ORDER OF THE OCEANS* 110 (1962).

high seas unacceptably dangerous or even impossible.⁶³ A condition of distress thus gives rise to a privilege of entry without becoming subject to local jurisdiction, but the privilege is available only to those who rightfully navigate on the high seas. An excellent summary of this approach is the statement of Bates, the umpire in the *Creole* case:

The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.⁶⁴

Whether a vessel that has proved actual distress or *force majeure* can claim immunity from local jurisdiction turns on whether the vessel had a lawful right to be on the high seas. If a ship cannot be interfered with on the high seas by the coastal State concerned, then the doctrine requires similar treatment by the coastal State in cases of involuntary entry into that State's waters under condition of distress. If, however, a vessel could be lawfully interfered with on the high seas, then its "unprotected" status could not be improved by a condition of distress.

Under the 1958 Convention on the High Seas, there are three circumstances in which States, acting through warships,⁶⁵ may seize or otherwise interfere with other⁶⁶ ships:⁶⁷ (1) piracy (art. 19); (2) ships engaged in the slave trade (art. 22); and (3) stateless vessels (art. 2, 4-6).⁶⁸

63. See 2 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 277 (1941) (reference to the doctrine of distress as "an exercise in large measure of those duties of hospitality and humanity which all civilized nations impose upon themselves and expect the performance of from others . . ."); *The Eleanor*, Edw. 135, 165 Eng. Rep. 842 (1809).

64. 2 J. MOORE, *DIGEST*, *supra* note 31, at 360.

65. High Seas Convention, *supra* note 2, arts. 8, 21-22.

66. Ships of a flag State are, of course, always subject to the jurisdiction of that State. High Seas Convention, *supra* note 2, art. 6. See *infra* note 68.

67. The situation of belligerency is not included. It is well settled that belligerency does not affect the basic legal status of the high seas, but only serves to include another arena for hostilities between the belligerents. See generally C. COLOMBOS, *supra* note 11, § 496; B. BRITTIN, *supra* note 56, §§ 1000, 1010.

68. The relevant articles of the High Seas Convention, *supra* note 2, are as follows:

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the

The Law of the Sea Convention⁶⁹ made no significant changes with respect to pirate ships or ships engaged in the slave trade,⁷⁰

other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Article 4

Every State, whether coastal or not, has the right to sail ships under its flag on the high seas.

Article 5

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 6

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Article 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting: (a) That the ship is engaged in piracy; or (b) That the ship is engaged in the slave trade; or (c) That, though flying a foreign flag or refusing to show its flag the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

69. See Convention, *supra* note 14.

70. *Id.* arts. 100-07, 110.

but strengthened the sanctions regarding stateless vessels⁷¹ and added a new sanction against unauthorized broadcasting from the high seas.⁷² While broadcasting sanctions might well be relevant to an insurgency, the other two of primary concern are piracy and statelessness. Thus, the insurgent's claim of necessity due to distress or *force majeure* would be upheld under the high seas refuge approach if, after establishing the factual necessity, the insurgent claimant was able to establish that the vessel in question was neither a pirate nor stateless.⁷³ This additional require-

71. *Id.* Article 94 increases the administrative aspects (duties of the flag state); article 110(d) authorizes a warship to board a ship suspected of being without nationality.

72. Article 109 reads as follows:

1. All States shall co-operate in the suppression of unauthorized broadcasting from the high seas.
2. Any person engaged in unauthorized broadcasting from the high seas may be prosecuted before the court of the flag State of the vessel, the place of registry of the installation, the State of which the person is a national, any place where the transmissions can be received or any State where authorized radio communication is suffering interference.
3. On the high seas, a State having jurisdiction in accordance with paragraph 2 may, in conformity with Article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.
4. For the purposes of this Convention, "unauthorized broadcasting" means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.

Id.

73. A possible contention that the doctrine of distress or *force majeure* is available only in instances where the two flag States involved have existing diplomatic relations is without real foundation, although such relations have been mentioned. See 2 J. MOORE, DIGEST, *supra* note 31, at 341-42 (discussing distress as treaty provision); *id.* at 351 (mentioning "forced into port of friendly power"). There are three reasons why such a contention should fail: (1) recognition and other diplomatic relations are discretionary and determined by political exigencies, whereas the doctrine of distress is an outgrowth of man's use of the sea, and is determined by humanitarian considerations; (2) recognition and diplomatic relations (other than belligerency) do not affect freedom of the high seas, and thus should not affect a determination under either approach; and (3) the 1958 Convention on the Territorial Sea and Contiguous Zone, *supra* note 36, and the Convention, *supra* note 14, cannot be interpreted with recognition as a prerequisite. See *supra* notes 36-38 and accompanying text. See also Lowe, *supra* note 21, at 610, (dismissing the recognition requirement based on humanitarian considerations, but then limiting the distress doctrine to *merchant* ships). The exclusion of warships does not appear supported by the authorities cited or by the humanitarian foundation of the doctrine. At one time the dispute over right of innocent passage by warships (see generally M. McDUGAL & W. BURKE, *supra* note 62, at 283-84; G. SCHWARZENBERGER, *supra* note 20, at 83) may have supported such a premise, but the recent Law of the Sea agreements have resolved this. See Convention, *supra* note 14, arts. 17-19, 29-32.

ment is reasonable from both perspectives: that of the world maritime community and that of the vessel involved. A pirate ship cannot be tolerated, but the burden of proving piracy is on the accuser. Stateless vessels are also not tolerated, and customary international law makes evidencing requirements by the vessel minimal.⁷⁴

In summary, a district court presented with a claim for immunity from local jurisdiction by an insurgent vessel alleging entry into port due to distress or *force majeure* would determine the claim using the all-encompassing exception approach or the somewhat limiting high seas refuge approach. The insurgent vessel would, under the all encompassing exception approach, only be required to establish its bona fide condition of distress. Under the more restrictive high seas refuge approach, which is more in consonance with the Law of the Sea Conventions, the ship would additionally be required to establish its right to be on the high seas. This right exists in the absence of conclusive evidence that the ship is stateless, or is engaged in the internationally prohibited acts of piracy, slave trading, or unauthorized broadcasting. Referring to the scenario, the immunity of the insurgent warship from local jurisdiction thus turns on disproving the ship as a pirate or as stateless. The following sections consider these questions.

INSURGENTS AND PIRACY

The problem presented by the scenario puts the vessel in question under the close scrutiny of a district court. A more likely situation would involve the question of sanctions against an insurgent warship on the high seas which is fully operational. However, the distinction is insignificant, since a court must adjudicate the piracy question with respect to the vessel claiming distress from a high seas perspective.

An analysis of maritime insurgency as piracy should consider three factors: (1) the interrelated duality of piracy as both a domestic crime and as an offense against the law of nations; (2) the "private ends" requirement;⁷⁵ and (3) intent as evidenced by se-

74. A logical consideration indicates why stateless vessels are inherently suspect. Vessels not operated by States fall into two categories of principal use: lawful and unlawful. Private vessels engaged in lawful pursuits, such as fishing, commerce, or pleasure cruising, must be registered to obtain insurance, clear and enter port, and gain protection of a State. Thus, an unregistered vessel encountered on the high seas is not insured, has not cleared any port, and cannot enter any port. See cases cited *infra* note 139.

75. "The private ends test does not have a precise definition, but generally an act will be deemed to have a private end if it is without lawful authority and is

lectivity of victims. The first factor, as developed through history to codification in the Law of the Sea Convention, is important as a gradual limitation of municipal jurisdiction. The other factors serve to delineate the limited arena within which acts may be insurgency, but beyond which are piracy.

Historical Development of Sanctions Against Piracy in Domestic and International Customary Law

Piracy has been a scourge of seafarers since the beginning of recorded history.⁷⁶ First noted as enemies of the whole human community by the Romans,⁷⁷ pirates have been historically subjected to punishment by any State.⁷⁸ Piracy is the only international crime recognized by customary international law.⁷⁹ The first English statute dealing with pirates was the Offenses at Sea Act of 1536,⁸⁰ which established trial procedure but did not define piracy. A 1698 statute included as pirates those persons committing piracy, robbery, or other hostility against British subjects under color of foreign commission or pretence of authority.⁸¹

In the United States, piracy was included in the list of congressional concerns during the Constitutional Convention of 1787.⁸² In 1790, Congress enacted the Crimes Act,⁸³ which made piracy a statutory offense. A municipal and international distinction was not made, with the result that a crime punishable by death within one of the States would, if committed by *any* person on the high

committed for personal gain or revenge." Crockett, *supra* note 15, at 79. See *infra* notes 121-25 and accompanying text.

76. The following are three excellent references on the legal history of piracy, from which a great deal of the background in this section is drawn: Harvard Law School, *Research in International Law, Codification of International Law (Part IV, Piracy)*, 26 AM. J. INT'L. 740 (Supp. 1932) [hereinafter cited as Harvard: *Draft Convention*]; Harvard Law School, *Research in International Law, Codification of International Law (Part V, A Collection of Piracy Laws of Various Countries)*, 26 AM. J. INT'L. 888 (Supp. 1932) [hereinafter cited as Harvard: *Collection*]; Sundberg, *supra* note 35.

77. See Sundberg, *supra* note 35, at 338.

78. 1 OPPENHEIM'S INTERNATIONAL LAW 590 (8th ed. 1955).

79. 1 A. McNAIR, INTERNATIONAL LAW OPINIONS 265 (1956).

80. An Acte for Punysshement of Pyrotes and Robbers of the See, 28 Hen. 8, ch. 15 (1536), in STATUTES OF THE REALM 671 (1817, reprinted 1963).

81. An Act for the More Effectual Suppression of Piracy, 11 Will. 3, ch. 7 (1698), in STATUTES OF THE REALM 590 (1820, reprinted 1963).

82. 5 ELLIOT'S DEBATES 543 (1845, reprinted 1937).

83. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 112-115.

seas, be punishable under the laws of the United States.⁸⁴ The piracy sections of the act were patterned after the relevant British statutes,⁸⁵ and thus the United States conformed to the concept of piracy as a special ground of State jurisdiction rather than a crime against the law of nations.⁸⁶ This distinction is important to the high seas insurgent, because it potentially subjects him to the jurisdiction of any State based on acts defined by that State's municipal laws, without regard to whether the insurgent's acts on the high seas involved the State in question.

The first insurgency-piracy case decided by the Supreme Court was *United States v. Klintock*.⁸⁷ There the defendant was not exempted from the charge of piracy by virtue of a "commission" from a self-styled "Brigadier of the Mexican Republic."⁸⁸ In dictum clarifying the 1790 Act, Chief Justice Marshall distinguished belligerencies, possibly to include insurgent acts:

Those general terms [piracy] ought not to be applied to offenses committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offenses committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.⁸⁹

The Act of March 3, 1819⁹⁰ specifically extended United States jurisdiction over those persons apprehended for "the crime of piracy, as defined by the law of nations" This statute was replaced by the Act of May 15, 1820,⁹¹ which made no reference to the "law of nations," but defined a pirate as one committing rob-

84. *Id.*; see Harvard: *Collection*, *supra* note 76, at 893-99.

85. The contemporary British statute, the Piracy Act of 1721, 8 Geo. 1, ch. 24, was only a minor amending of the 1698 statute, which in turn was based substantially on the 1536 statute. See *supra* notes 80 & 81; Sundberg, *supra* note 35, at 345; Harvard: *Collection*, *supra* note 76, at 910-12.

86. Properly speaking, then, piracy is not a legal crime or offence under the law of nations. In this respect it differs from the municipal law piracy which is a crime by the law of a certain state. International law piracy is only a special ground of state jurisdiction—of jurisdiction in every state. This jurisdiction may or may not be exercised by a certain state. It may be used in part only. How far it is used depends on the municipal law of the state, not on the law of nations. The law of nations on the matter is permissive only. It justifies state action within limits and fixes those limits. It goes no further. To think of piracy as a crime under the law of nations, therefore, tends only to confuse the draftsman and an interpreter of the draft convention. The proper purpose of a draft convention codifying the international law of piracy is not to unify throughout the various municipal laws of piracy, nor to provide uniform measures for punishing pirates, but to define this extraordinary basis of state jurisdiction over offences committed by foreigners against foreign interests outside the territorial and other ordinary jurisdiction of the prosecuting state.

Harvard: *Draft Convention*, *supra* note 76, at 759-60.

87. 18 U.S. (5 Wheat.) 144 (1820).

88. *Id.* at 149.

89. *Id.* at 152.

90. Ch. 77, 3 Stat. 510.

91. Ch. 113, 3 Stat. 600.

bery on the high seas.⁹²

Two insurgent cases of the period made reference to the law of nations, but relied on municipal law. In *United States v. Baker*,⁹³ which involved the indictment of the officers and crew of the Confederate cruiser *Savannah*, the court held that, since the evidence showed intent to depredate only United States vessels and property, the defendants could not be found guilty of piracy under the law of nations.⁹⁴ The other case arose out of an incident during the ongoing insurrection against Spanish rule in Cuba. In 1873, Cuban insurgents obtained a vessel and registered it in the United States as the *Virginus*. While flying the American flag, it was seized on the high seas by a Spanish cruiser, and taken to Cuba. Fifty-three of the persons on board, including American and British citizens, were tried for piracy by Spanish court-martial, and shot.⁹⁵ The *Virginus* case illustrates the grave problems inherent when individual nations adopt the special jurisdiction doctrine to consider allegations of piracy on the high seas.⁹⁶ In essence the ship had committed no act of violence on the high seas and, while admittedly part of a mission to violate Spanish municipal law, the violative actions could not reach fruition until the ship had left the high seas and was within Cuban waters. The *Virginus* was thus "more innocent" of piracy than the *Savannah*, but the standards applied to the *Virginus*' crew were different.⁹⁷ In 1873 it could thus be said that a pirate was a ship seized on the high seas and adjudged a pirate strictly under the laws of the apprehending State, even though, paradoxically, the basis for seizure was that the pirate was "*hostis generis humani*." Of note was Congress' resurrection, in 1874, of the 1819 provision for punishing piracy "as defined by the law of nations."⁹⁸

The British experience with insurgency during this period was

92. *Id.* The Act also defined piracy to include landing ashore from a ship and committing depredations, and included provisions regarding the slave trade.

93. 24 F. Cas. 962 (C.C.S.D.N.Y. 1861) (No. 14,501).

94. *Id.* at 965. However, the court held that the defendants could be tried for statutory offenses. *Id.*

95. See, e.g., 1 C. HYDE, *supra* note 30, at 244.

96. See *supra* note 86.

97. The "high seas-courtroom" analysis is useful at this point. The *Savannah* court, in essence, removed itself to the high seas and found no violation of international law by the ship. The *Virginus* tribunal, conversely, brought the high seas under its jurisdiction and found a violation of municipal law.

98. Rev. Stat. Sec. 5368 (repealed and re-enacted Act of Mar. 4, 1909, §§ 290-310, 35 Stat. 1088, 1145-1148).

more involved. In 1821, during a rebellion of the Greeks against Turkey, a foreign office report advised that: "It would not be proper to consider persons as pirates who may be cruising under a State of alleged hostilities whether regular or irregular, provided their intentions were in fact satisfactorily distinguished from the mere predatory character of piracy, as considered in law."⁹⁹

In 1832, during the struggle for the Falkland Islands, the United States ship *Lexington*, in response to the seizure of an American whaler by the appointed governor of Buenos Aires, landed a force, destroyed a fort, and took off several persons to have them tried for piracy. One of those seized was a British subject, and, although the British challenged the Buenos Aires sovereignty of the islands,¹⁰⁰ they denounced any charge of piracy, as the Briton was acting under orders of a regular and acknowledged government.¹⁰¹

In 1848, British authorities would not comply with a request of the Venezuelan government to seize a rebel ship as a pirate.¹⁰² However, during an 1870 Venezuelan rebellion, after a British merchant ship was attacked and plundered by a rebel warship, a charge of piracy was considered appropriate.¹⁰³ The British practice, therefore, was to leave alone those unrecognized insurgent warships as long as they did not molest third State ships, subjects or commerce. This practice was further illustrated by incidents involving Spanish rebels¹⁰⁴ and the celebrated affair of the Peru-

99. 1 A. McNAIR, *supra* note 79, at 267.

100. The Falkland Islands are an example of the impact of the Law of the Sea negotiations on old controversies. Great Britain and Spain maintained struggling settlements in the late 18th century, with the British abandoning their garrison (but not their claim) in 1774 and Spain leaving theirs in 1810. In 1829 the new state of Buenos Aires commissioned a Governor for the Falklands, with a private monopoly over the valuable whaling and sealing rights. An attempt to exercise this monopoly invoked the American reaction in 1832. 1 A. McNAIR, *supra* note 79, at 268. The British, apparently sensing an American takeover of the islands and control of south Atlantic fishing and sealing, reinstated its claim and garrison, displacing the Argentines. The British maintained control and developed the islands without incident until the late 1950's. As the new regime of the sea began to unfold, the Falklands became an increasingly obvious Argentine key to ocean wealth under continental shelf and exclusive economic zone concepts. After lengthy and fruitless negotiations the issue erupted into the 1982 war. See THE ECONOMIST, Apr. 10, 1982, at 27. During their brief occupation of the islands the Argentine foreign minister stated: "there is something much more important than national pride. The meaning of the Argentine presence in the islands is that Argentina controls an area in the South Atlantic, politically and economically . . ." THE ECONOMIST, Apr. 24, 1982, at 14.

101. 1 A. McNAIR, *supra* note 79, at 268.

102. *Id.* at 270. A similar problem involving the rebellion of Venice against Austria occurred the same year. *Id.* at 271.

103. *Id.* at 272-73.

104. *Id.*

vian insurgent ship *Huascar*.¹⁰⁵

An American case in 1885 sought to define a threshold for entry by insurgents onto the high seas.¹⁰⁶ The rebel cruiser *Ambrose Light* was seized by a United States warship off Colombia. In the belief that her insurgent commission was irregular, the cruiser was brought into the United States and claimed by the government to be forfeit, as a pirate, under the law of nations. The lengthy circuit court opinion turned on a single issue:

[T]he liability of the vessel to seizure, as piratical, turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from . . . any other nation; and, that, in the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical.¹⁰⁷

The *Ambrose Light* is instructive for a number of reasons: (1) it is the most thorough attempt to formulate a legal threshold for dealing with insurgent warships; (2) it attempted to distinguish the *in rem* suit from criminal proceedings against the crew for piracy, reaching a puzzling conclusion that a vessel could be condemned as a pirate but the crew not found guilty of piracy;¹⁰⁸ (3) it attempts to expand the classic concept of piracy as "sea robbery" to include any "unauthorized" maritime warfare;¹⁰⁹ and (4) it essentially allows the executive and judicial departments to "define and punish piracies on the high seas" contrary to article I, section 8 of the Constitution.¹¹⁰ The decision, however, has been

105. The *Huascar* had been seized by Peruvian insurgents in 1877, and, without flying colors, stopped three British ships, taking mail, coal, Peruvian officials, and a British engineer. A British naval squadron attacked and damaged the *Huascar*, which escaped and surrendered to the Peruvian government. Peru later demanded satisfaction from the British for "outrages" committed on the *Huascar*. The British refusal was based on a prior Peruvian disavowal of the acts of the rebel ship, and on the depredations caused by the ship against a third State. *Id.* at 274-80.

106. The *Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885).

107. *Id.* at 412.

108. *Id.* at 415.

109. *Id.* at 416.

110. None of the statutes expressly included insurgents. See Harvard: *Collection*, *supra* note 76, at 893-99 and references cited therein. The *Ambrose Light* opinion refers to "piracy in the view of international law." 25 F. at 412. Judge Brown included unrecognized rebels within the international definition of piracy and held that any form of diplomatic recognition is a political function of the executive department. Thus the holding "that in the absence of recognition by any government of their belligerent rights, insurgents that send out vessels of war are . . . private persons engaged in unlawful depredations on the high seas . . . such acts are therefore piratical . . ." *Id.* at 412-13. The word "any" preceding "gov-

largely discredited.¹¹¹

Subsequently, the United States rejected decrees by Venezuela in 1885, Haiti in 1889, and Chile in 1891 declaring insurgent vessels as pirates,¹¹² and a Navy task force was ordered not to interfere with insurgent vessels unless their acts were directed against Americans.¹¹³

Two incidents prior to World War II maintained the concern over piracy in the twentieth century. In 1929 the Venezuelan government requested American and British authorities to declare as a pirate the *S.S. Falke*,¹¹⁴ which made one abortive raid before putting into Trinidad without coal or funds to purchase it. The incident fizzled out when the British flatly refused to consider the ship a pirate, choosing instead to label such behavior as "a filibustering expedition . . ."¹¹⁵ During the Spanish Civil War, most of the Mediterranean powers signed the Nyon Arrangements¹¹⁶ treating attacks on neutral merchant shipping as piratical. The Nyon Arrangements have been criticized.¹¹⁷ In considering the doctrinal concept involved, the Nyon Arrangements might well be viewed as a multi-lateral extension of jurisdiction, giving the signatories nearly municipal authority over the Mediterranean.

ernment" does not affect this issue: the executive department ascertains the *de facto* insurgency and recognition by other governments, as well as declaring or withholding United States recognition.

111. The strongest rejection of the opinion was by the very person to whom the opinion deferred: less than three months after the opinion, President Cleveland declared that insurgent vessels could not be considered "hostis humani generis within the precepts of international law," and Secretary of State Bayard denounced the incident as an unauthorized intervention in the domestic strife in Columbia. T. CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 403 (1951). The preeminent commentary on piracy noted the opinion as "different," expressed doubt as to its conformity with established international law, and noted as proper the expressed reluctance of the United States to so conduct itself. Harvard: *Draft Convention*, *supra* note 76, at 858-59. In 1929, the State Department flatly stated: "Notwithstanding the decision . . . in the *Ambrose Light* . . . the weight of opinion is clearly to the effect that an insurgent vessel cannot be treated as piratical merely because the insurgents have not been recognized as belligerents." See 2 G. HACKWORTH, *supra* note 63, at 697.

112. Green, *The Santa Maria: Rebels or Pirates?*, 37 BRIT. Y.B. INT'L L. 496, 501 (1961).

113. *Id.* at 502.

114. 2 G. HACKWORTH, *supra* note 63, at 698-99.

115. *Id.* at 699.

116. International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines, Sept. 14, 1937, 181 L.N.T.S. 135; International Agreement for Collective Measures Against Piratical Attacks in the Mediterranean by Surface Vessels and Aircraft, Sept. 17, 1937, 181 L.N.T.S. 149.

117. See H. LAUTERPACHT, *supra* note 54, at 295-96; Finch, *Piracy in the Mediterranean*, 31 AM. J. INT'L L. 659 (1937); Genet, *The Charge of Piracy in the Spanish Civil War*, 32 AM. J. INT'L L. 253 (1938).

Codification of Piracy: From the Law of Nations to the Law of the Sea

When the first Conference on the Law of the Sea convened in 1958, the inquiry should perhaps have addressed the further need for codification of piracy, since the days of buccaneers roaming the seas had long since passed.¹¹⁸ In fact, Uruguay proposed deletion of the piracy articles of the Draft Convention partly on the ground that piracy no longer constituted a general problem.¹¹⁹

Nevertheless, the Conference did codify international law on piracy.¹²⁰ The piracy articles were based largely on the 1932 Harvard Draft Convention.¹²¹ With respect to insurgents the cornerstone of the definition of piracy is the "private ends" requirement, which excludes acts committed for public or even political ends from treatment as piratical. Originally appearing in article 3 of the Harvard Draft,¹²² the private ends clause carried over to article 15 of the 1958 Convention. The inclusion of the private ends requirement was not accomplished without debate. An Albanian-Czechoslovak revision which would have accommodated "Piracy for Political Reasons" was proposed and rejected.¹²³ The most intense objection to the private ends requirement came from the Soviet Union. Angered over the harassment by Nationalist Chinese warships of vessels destined for Communist Chinese ports, the Soviet Union sought to expand the definition of piracy to include unlawful actions by State vessels on the high seas. The proposal was overwhelmingly rejected.¹²⁴ The private ends requirement is thus firmly established in international law.¹²⁵

118. See H. LAUTERPACHT, *supra* note 54, at 307; Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925); Harvard: *Draft Convention*, *supra* note 76, at 764.

119. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 661 (1963).

120. High Seas Convention, *supra* note 2, arts. 14-22.

121. Sundberg, *supra* note 35; accord Crockett, *supra* note 15, at 83-84.

122. Harvard: *Draft Convention*, *supra* note 76, at 798.

123. 4 M. WHITEMAN, *supra* note 119.

124. *Id.* at 662; see also W. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 181-82 (1971); M. McDOUGAL & W. BURKE, *supra* note 62, at 818-21.

125. In its first test, the 1958 Convention was strained by those nations endorsing the private ends requirement. On January 23, 1961, the Portuguese liner *Santa Maria* was seized by a dissident group while on the high seas in the Caribbean. Portugal immediately requested British, Dutch, and American assistance to recover the vessel from the "pirates." The three governments responded, with both British and United States announcements implying the act was clearly piracy. Following the brief control by the rebels, who claimed to be supporters of the anti-Salazar party of General Delgado, and an uneventful surrender of the ship in Bra-

At the Third United Nations Conference on the Law of the Sea, the Convention incorporated the piracy articles virtually unchanged.¹²⁶ A new element has, however, been added to the regulation of piracy. As noted by Dubner,¹²⁷ there are still unresolved jurisdictional questions concerning the expanded Territorial Seas, Contiguous Zone, and Exclusive Economic Zone (EEZ). Although article 58 incorporates the piracy articles, it leaves the coastal State with regulatory authority over the exploitation of resources in the EEZ. Overshadowing all other considerations is the basic character of the economic zone as a resource base of the coastal State. In the context of an insurgency within a coastal State, such as that described in the scenario of this Comment, the EEZ assumes a character more analogous to territory than to high seas. The result is that a third State, observing a coastal State government and an adversary insurgent movement in maritime conflict over the assets of the economic zone, cannot consider the insurgent as operating on the high seas.¹²⁸

Conclusions with Respect to Insurgents and Piracy

Until the formulation of the international rules for accommodating the exploitation of the sea, the regulation of piracy was a mutual acceptance of the jurisdiction of all nations to prosecute piracy on the high seas under municipal law. The 1958 Convention on the High Seas, and its successor, the 1982 Convention, have replaced the extended jurisdiction concept with an interna-

zil, the governments quickly forgot the incident and left the controversy to the commentators. See C. COLOMBOS, *supra* note 11, at 445-46; M. McDOUGAL & W. BURKE, *supra* note 62, at 821-23; Dubner, *The Law of International Sea Piracy*, 11 N.Y.U. J. INT'L L. & POL. 471, 483-84 (1979); Fenwick, *'Piracy' in the Caribbean*, 55 AM. J. INT'L L. 426 (1961); Green, *supra* note 112; Sundberg, *supra* note 35, at 374-75. Professor Fenwick supports the label of piracy based on the presence of third-state nationals on the ship, the fact that the seizure itself "began" the rebellion, the failure of the seizure, and the fact that the group leader held no public office. Sundberg favors Fenwick's position. Professor Green derides Fenwick's thesis, noting the pure political nature of the act against the framework of political realities in Portugal. The others support the political and therefore non-piracy nature of the act. A persuasive notion is that of Crockett, *supra* note 15, at 94-95, who notes the scholarly debate and subordinates it to the "broader and less tangible interests" of the maritime powers involved.

126. Convention, *supra* note 14.

127. Dubner, *supra* note 125, at 477-80.

128. Some technical problems arise elsewhere. For example, the Convention, *supra* note 14, prohibits non-transit activities by ships and aircraft exercising transit passage through straits. *Id.* art. 39. This would appear to preclude a transiting warship from acting against a pirate vessel in a strait. Even stricter prohibitions exist for archipelagic waters, under article 52. This is of more than academic concern, for two areas with inordinate pirate activity are Indonesia and the Philippines. See M. McDOUGAL & W. BURKE, *supra* note 62, at 16 n.43; Dubner, *supra* note 125, at 474.

tional codification. Thus, while regulation of municipal or statutory piracy may be continued for those persons and vessels within the jurisdiction of the State, a piracy prosecution involving persons and vessels outside its municipal jurisdiction must comply with the articles of the 1958 High Seas Convention. The result appears to be that, in the absence of evidence of depredations of third State ships, property, or persons on the high seas, third States cannot prosecute insurgent warships as pirates.¹²⁹ In the scenario of this Comment, the district court should find that the insurgent warship was not a pirate. Consequently, the claim for jurisdictional immunity based on distress should go forward.

INSURGENT WARSHIPS AS STATELESS VESSELS¹³⁰

The traditional view of international law is that only States can be its subjects; individuals are only its objects.¹³¹ This is reflected in maritime law by the principle that only States may operate ships on the high seas.¹³² The corollary of this principle is that every vessel sailing the high seas must fly the flag of some nation.¹³³ As noted by one commentator:

The entire legal system which States have evolved for the regulation of the use of the high seas is predicated on the possession by each vessel of a connection with a State having a recognized maritime flag. This connection has been commonly called nationality. The lack of nationality, which might better be termed "statelessness," robs a ship of privileges, and deprives it of a State to espouse its cause when it suffers injustice at the hands of another State. Even the privilege of clearing port may be denied the stateless vessel . . . It is by this control of their ports that States, in

129. As an example, the sole section for prosecuting non-citizens accused of piracy not involving United States citizens or property is 18 U.S.C. § 1651 (1976), which uses a "law of nations" definition. Of necessity this incorporates article 15 of the High Seas Convention, *supra* note 2, and, accordingly, the private ends requirement.

130. The overall concept of statehood as legal acceptance by the international community involves complex principles which, considering the scope of this Comment, must be addressed only superficially. The material herein was drawn principally from the following general works: T. CHEN, *supra* note 111, chs. 19-26; C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (P. Corbett trans. 4th ed. 1978); J. HERVEY, *THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW* 54-80 (1928); P. JESSUP, *A MODERN LAW OF NATIONS* ch. 3 (1968); H. LAUTERPACHT, *INTERNATIONAL LAW* chs. 3, 6 (E. Lauterpacht ed. 1970); H. LAUTERPACHT, *supra* note 54; 1 A. McNAIR, *supra* note 79; 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* ch. 2 (1963); Lansing, *Notes on Sovereignty in a State* (pts. 1 & 2), 1 AM. J. INT'L L. 105, 297 (1907).

131. H. LAUTERPACHT, *supra* note 130, at 136.

132. *See supra* notes 65, 68.

133. H. BAER, *ADMIRALTY LAW OF THE SUPREME COURT* 619 (1979).

practice, clear the high seas of nondescript vessels.¹³⁴

The ultimate loss of privilege referred to above is seizure on the high seas; a "stateless" vessel is without State protection. The definitive case in this area is *Molvan v. Attorney General For Palestine*,¹³⁵ which involved the post-World War II movement of Jews into Palestine. A British destroyer patrolling the high seas encountered the *Asya*, which was flying no flag.¹³⁶ Suspecting a possible attempt to violate the immigration laws of the Mandate,¹³⁷ the vessel was boarded and, upon finding 733 unlawful immigrants, the British seized the vessel and escorted it to Haifa. The vessel was forfeited, and on appeal by the owner the Privy Council affirmed. Lord Simond's opinion included the following:

[T]he appellant has invoked the doctrine which is called "the freedom of the open sea", alleging that under the shield of that doctrine the *Asya* was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine [No] such right, unqualified by place or circumstance, is established by international law [T]he freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions¹³⁸

Molvan has been followed in numerous cases of high seas seizure of stateless vessels by States seeking to enforce municipal law.¹³⁹ This principle of law has been codified in the Law of the Sea Convention.¹⁴⁰

Insurgents and Statehood

The focus of an inquiry involving an insurgent vessel is not so much on the ship but on the "State" itself.¹⁴¹ In order to be entitled to "sail ships of its flag on the high seas," the insurgent organization must have either an independent right to function as a sovereign entity within the world community of nations, or else a

134. M. RIENOW, *TEST OF THE NATIONALITY OF A MERCHANT VESSEL* 12-15 (1937).

135. *Naim Molvan v. Attorney-General for Palestine* [The "*Asya*"], 1948 A.C. 351; 81 Lloyd's List L.R. 277 (1948).

136. The ship hoisted a Turkish flag, then a Zionist flag as the destroyer approached. *Id.* at 352.

137. At the time, Palestine was administered by Great Britain under the Mandate system established by article 22 of the Covenant of the League of Nations. See generally 3 H. LAUTERPACHT, *INTERNATIONAL LAW* 29-110 (E. Lauterpacht ed. 1977) (collected papers).

138. 1948 A.C. at 369-70.

139. Recent United States cases have targeted "stateless" drug smuggling vessels. See *United States v. Monroy*, 614 F.2d 61 (5th Cir. 1980); *United States v. Cortez*, 588 F.2d 106 (5th Cir. 1979); *United States v. Rubies*, 612 F.2d 397 (9th Cir. 1979).

140. The Convention, *supra* note 14, art. 110 § 1(d), includes permissive boarding of foreign ships by warships, based on reasonable grounds of suspecting that the ship is without nationality.

141. A collateral question involving "warship" criteria is covered by the High Seas Convention, *supra* note 2, art. 8.

lawful claim to exercise the rights of the parent government, hostile to its desires, absent the parent government's capability to extinguish that claim by force.¹⁴² Before considering these alternatives, the basic concepts should be briefly discussed.

Statehood

The "State" as an entity has been defined as a "particular portion of mankind viewed as an organized unit."¹⁴³ An early commentator noted that publicists tended to expand concepts of the State by adding qualifications, most notably a fixed territorial abode and a large population.¹⁴⁴ To these he replied: "in the consideration of sovereignty, the state as an organized community of individuals is of importance. In fact, the qualification of occupation of territory is . . . nonessential The same objection applies to the requirement as to numbers" ¹⁴⁵

International efforts have nonetheless tended to orient towards qualifications, most notably: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.¹⁴⁶

To resolve these differences, Lansing draws a distinction between the political State and the territorial State.¹⁴⁷ The community of human beings united as an entity can thus be considered as a political unit even though displaced from or held captive within their traditional territory. The territorial State is of importance only with respect to the political State. In light of contemporary examples, Lansing's 1907 descriptions are particularly apt.¹⁴⁸

Sovereignty

The two traditional concepts of sovereignty are: (1) sovereign

142. See generally Wilson, *Insurgency and Maritime Law*, 1 AM. J. INT'L L. 46 (1907).

143. 1 BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 51 (quoted in Lansing, *supra* note 130, at 108).

144. Lansing, *supra* note 130, at 108.

145. *Id.*

146. Convention on Rights and Duties of States, *supra* note 3, art. 1.

147. Lansing, *supra* note 130, at 109.

148. For example, if the territorial requirement of statehood is valid, how can one reconcile the recognition of Palestinian statehood? See Comment, *supra* note 6. With respect to the population requirement, consider the Holy See. See K. SCHUSCHNIGG, *INTERNATIONAL LAW* 89-90 (1959).

power originates in the people themselves who control their government, and (2) sovereign power exists in a personage, and flows down as grants to the populace.¹⁴⁹ A more helpful view, however, holds sovereignty as simply the supreme coercive power in a State, which rests on material force and is exercised by the possessor.¹⁵⁰ This latter view is most appropriate for third States and others outside the civil strife to consider the sovereignty issues involved in the insurgency.

Successful popular revolutions and the suppression of rebellions are the manifestations of the real sovereignty in a State. Both are coercive in character, both compel obedience, and both require the exercise of superior physical strength, including in that term the use of weapons of war, military skill, discipline and equipment.¹⁵¹

From the perspective of third States, the first consideration is whether the State concerned has the "possessor of sovereignty" within it (as opposed, for example, to a colony, or a State occupied by a hostile force). The second consideration, *which* internal possessor, arises in the event of civil strife:

When . . . a state of civil war exists, there may be . . . two distinct governments, each of which claims to be the true and sole agent of the sovereign In these circumstances . . . other states . . . may declare . . . uncertainty by recognizing the legal right of the government which prior to the war represented the sovereign, and the belligerent right of the other, which denies the authority of the older government to act for the sovereign, and is attempting by force to disprove such authority. By this course a foreign sovereign or government remains non-committal, neutral, until the real sovereign by exercising superior physical might manifests which of the rival governments is its true agent.¹⁵²

The nature of the internal struggle must be considered, so that foreign governments would not react to mere banditry. At the 1949 Diplomatic Conference in Geneva, an attempt was made to define "armed conflict" that was not of an international character. Although not adopted, the criteria were considered indicative of an insurgency which had achieved belligerent status. They essentially required the insurgents to (1) possess the internal and external attributes plus the manifestations of conduct commensurate with a State, and (2) be effectively beyond the control of the parent government to such extent as to cause express or implied recognition by it.¹⁵³

149. 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 583 (1963).

150. Lansing, *supra* note 130, at 111.

151. *Id.* at 121.

152. *Id.* at 298-99.

153. Final Record of the Diplomatic Conference of Geneva 1949, vol. II-B, at 121 (quoted in 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 40-41 (1963)). The specific criteria are:

The requirement for control of a determinate part of the national territory¹⁵⁴ presents difficulties in two instances: (1) where the insurrection is conducted, in essence, from outside the "territorial State;" and (2) where the insurrection is conducted within the extensive maritime zones created by the Law of the Sea Convention. Since no precedents as yet exist for the latter, the former is possibly instructive. While crossborder insurrections have occurred in several States,¹⁵⁵ the example of the Palestine Liberation Organization (PLO) is a continuing precedent.¹⁵⁶ The PLO has been recognized, not only by numerous States, but also by the United Nations,¹⁵⁷ as the representative of the Palestinian people, and thus entitled to international rights and duties as a "quasi-State."¹⁵⁸ Thus while not satisfying the criteria for statehood,¹⁵⁹ the "State" is created in international law. In this respect

(1) that the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. (2) that the legal Government is obliged to have recourse to the regular military forces against the insurgents organized as military and in possession of a part of the national territory. (3)(a) that the *de jure* Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression. (4)(a) that the insurgents have an organization purporting to have the characteristics of a State. (b) that the insurgent civil authority exercises *de facto* authority over persons within a determinate territory. (c) that the armed forces act under the direction of the organized civil authority prepared to observe the ordinary laws of war. (d) that the insurgent civil authority agrees to be bound by the provisions of the Convention. The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and shortlived insurrection.

154. *Id.*

155. See O'Neill, *supra* note 4. The Vietnam War is another example of a cross-border insurrection. While the Viet Cong insurgents exercised a great deal of control over the populace, they were highly transitory, and no definite identifiable territory was under continuing insurgent control. The Viet Cong operated from sanctuaries, primarily in Cambodia, which ultimately led to the 1970 United States decision to attack their sanctuaries. See Address to the Nation on the Situation in Southeast Asia, 1970 PUB. PAPERS OF RICHARD NIXON 405 (Apr. 30, 1970).

156. See Comment, *supra* note 6. Other "subjugated" people have been noted by the United Nations. See Legitimizing Self Determination Struggles of Various Southern Africa Peoples, G.A. Res. 2787, 26 U.N. GAOR Supp. (No. 29) at 82-83, U.N. Doc. A/8429 (1971).

157. Comment, *supra* note 6, at 454.

158. *Id.* at 456.

159. See *supra* note 146 and accompanying text.

recognition is all important. A true State, with internal sovereignty, exists with or without recognition,¹⁶⁰ and recognition only serves to legitimize international relations.¹⁶¹ The quasi-State, however, lacks sovereignty. If any "power" exists in the quasi-State, it is that which is granted by foreign States in the form of recognition.¹⁶² The same is true of the so-called government-in-exile.¹⁶³ Some important distinctions, however, also apply to recognition of any insurgent group. Utilizing the two-State view of Lansing,¹⁶⁴ the World War II governments in exile were the sovereign power of the political State. The Nazis were the sovereign power of the territorial State, and were contested in this by the various resistance efforts associated with the government-in-exile, which, in turn were recognized as belligerents by the Allies. The PLO is similarly recognized as the sovereign government of the political State, and as an insurgent with respect to the territorial State. The insurgency in this Comment's scenario, however, should not be recognized as sovereign of the political State, for that is at issue. Further, it should not be recognized as a belligerent to the territorial State, for there is no belligerency, absent control of some definite territory. To be recognized as a belligerent would require consideration of the maritime jurisdictional zones of the State as part of its national territory and recognize the effective control over a significant part of these zones by the insurgents. Such a situation, of course, presents difficulties: (1) occupation and control are, by the nature of a maritime area, fleeting; (2) there is no permanent "population" therein; and (3) the maritime areas could not constitute a separate State.¹⁶⁵

Central to the concern of other States is, of course, jurisdiction

160. This is the declaratory view of recognition. See generally H. LAUTERPACHT, *supra* note 54, at 41.

161. *Id.* at 42.

162. Thus a quasi-State can *only* exist under the constitutive view of recognition. *Id.* at 38-39.

163. See 1 M. WHITEMAN, *supra* note 149, at 921-30. There were nine "governments-in-exile" in London during the Nazi occupation of Europe. Six (Norway, Belgium, Greece, Luxembourg, Yugoslavia, and the Netherlands) were occupied by co-belligerents with continuing recognition. The governments of Czechoslovakia and Poland were recognized as created *ab origine*. The Free French were not recognized as the *de jure* government of France, but as a *de facto* governmental institution. See also H. KELSEN, *supra* note 29, at 410-12; 2 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 467-86 (1963).

164. See *supra* text accompanying notes 147-48.

165. This concept of insurgency as the establishment of an independent internal State which is contesting the established internal State for overall control is favorably noted by commentators. See H. LAUTERPACHT, *supra* note 54, at 177; P. JESSUP, *supra* note 130, at 53; M. SORESENSEN, *MANUAL OF PUBLIC INTERNATIONAL LAW* 287-88; BUNDU, *Recognition of Revolutionary Authorities: Law and Practice of States*, 27 INT'L & COMP. L.Q. 18, 25, 42 (1978). But cf. H. LAUTERPACHT, *supra* note 54, at 279-80.

over vessels in the maritime zones. States have no inherent right to conduct commerce on the land territory of another State, so the "interference" caused by a classic insurgency is legally non-existent. When the insurgency spills over into the maritime area, however, other States are affected. The American, Cuban, and Spanish Civil Wars are examples of insurgencies extending to even the high seas.¹⁶⁶

The Law of the Sea Conferences have created a new regime for the ocean areas which must be considered from the perspective of a maritime-oriented insurgency. Under the provisions of the 1982 Convention the coastal State enjoys the exclusive right to exploit the resources of the economic zone to a limit of 200 miles¹⁶⁷ and those of the continental shelf extending out to possibly 350 miles.¹⁶⁸ Foreign interests, such as fishing concerns or oil companies, can participate in this exploitation only within a legal framework created by the coastal State. The existence of an effective maritime insurgency, such as in the scenario, renders such a regime impossible. Indeed, a foreign fishing concern might seek out an exploitation arrangement with the insurgents, and the benefit to the insurgents, besides monetary royalties, would be an increased basis for international recognition.¹⁶⁹

Recognition itself is a complex international concept.¹⁷⁰ With respect to an insurgent warship, two questions arise. First, is the warship of an unrecognized insurgency stateless? Second, to what extent does recognition of an insurgency by a third State affect treatment of an insurgent warship by other States?¹⁷¹

166. See generally T. CHEN, *supra* note 111, at 342-48; H. LAUTERPACHT, *supra* note 54, at 250-53; 1 A. MCNAIR, *supra* note 79, at 385ff; Wilson, *supra* note 142, at 46.

167. Convention, *supra* note 14, arts. 55-57.

168. *Id.* arts. 76-77.

169. For an example of payments to insurgent governments see 1 M. WHITEMAN, *supra* note 149, at 920, concerning the Indonesian Civil War. In 1958, discussing payment of taxes by American firms on Sumatra to the rebel forces controlling Sumatra, the Department of State took the view that *de facto* insurgent authorities could properly compel such payment, thus relieving the firms of payment of similar taxes to the central government.

170. See generally authorities cited, *supra* note 130 (concept of statehood).

171. The principal consequence of a recognition of insurgency is to protect the insurgents from having their warlike activities, especially on the high seas, from being regarded as lawless acts of violence which, in the absence of recognition, might subject them to treatment as pirates. It may also sharpen the obligation of third states with respect to their duty of nonintervention in the conflict.

P. JESSUP, *supra* note 130, at 53.

The constitutive view of recognition, which considers States to exist in international law solely by virtue of recognition by other States, includes a perceived obligation for recognition when circumstances warrant.¹⁷² However, it is well settled in international law that recognition is a totally discretionary act of a sovereign State.¹⁷³ Thus, without such discretionary exercise, an insurgent warship would remain stateless. In the maritime sense, however, "stateless" is an absolute term, not one which merely reflects absence of recognition by the forum State.¹⁷⁴ The courts of the United States have noted this difference also, distinguishing insurgents unrecognized by any State: "From these principles it necessarily follows that in the absence of recognition by any government of their belligerent rights, insurgents that send out vessels of war are in legal contemplation, merely combinations of private persons engaged in unlawful depredations on the high seas"¹⁷⁵ Since the existence of an insurgency can occur without formal recognition by the political department, it follows that the courts must take judicial notice of it if the laws of the United States are to be enforced.¹⁷⁶

Recognition of insurgency is not a precisely defined status,¹⁷⁷ but rather a domestic proclamation alerting the public to circumstances in a foreign State which merit special caution.¹⁷⁸ The measure of such recognition is thus the effectiveness of the insurgents, and what is recognized is their effectiveness.¹⁷⁹

The very fact that an insurgent warship sails in defiance of the *de jure* government is evidence of the unsettled sovereignty of that State. The insurgent warship, then, cannot be stateless, since it is an essential part of the political State, necessary to ascertain the possessor of the sovereignty of that State.¹⁸⁰

172. See H. LAUTERPACHT, *supra* note 54, chs. 3-4.

173. See T. CHEN, *supra* note 111, at 352-63. Accord J. HERVEY, *supra* note 130, at 54; P. JESSUP, *supra* note 130, at 55; M. SORESENSEN, *supra* note 165, at 286.

174. See *supra* text accompanying note 162.

175. *United States v. The Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885).

176. *United States v. The Three Friends*, 166 U.S. 63, 65 (1898).

177. H. LAUTERPACHT, *supra* note 54, at 270.

178. T. CHEN, *supra* note 111, at 400.

179. Thus, H. LAUTERPACHT, *supra* note 54, at 293-94, draws a distinction between *de facto* and *de jure* recognition of insurgent governments.

180. A related question arising from the High Seas Convention, *supra* note 2, and the Convention, *supra* note 14, is the potential conflict between the articles prescribing immunity of warships and those authorizing right of visit. *Id.* arts. 29, 95, 110. An attempt by a third State warship to exercise right of visit on a "ship without nationality" *must* be resisted by an insurgent warship, in order to preserve the status of both the ship and the insurgent government.

CONCLUSIONS

The doctrine of distress is established by both customary international law and by the Law of the Sea Conventions. A vessel entering port due to distress, or *force majeure*, is subject to local jurisdiction only if that vessel could be lawfully interfered with on the high seas. Interference with foreign vessels on the high seas is permitted under international law only where circumstances indicate the vessel is a pirate, or is stateless, or is engaged in unauthorized broadcasting or in the slave trade. An insurgent vessel can only be considered a pirate under international law if its depredations are conducted for private (non-political) ends, or are directed against ships, persons, or property of (neutral) third States. An effective insurgent warship is an essential part of the political process which identifies the sovereign of its State, and thus such a ship cannot be considered as stateless. Thus an insurgent warship is not subject to lawful interference on the high seas by neutral third States absent circumstances which evidence depredations of third State vessels.

GRANT RICHARD TELFER

